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No. 04-631

In The

Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) When a State taxes the receipt of fuel by non-tribal distributors, manufacturers and importers, and such receipt occurs off-reservation, does the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), apply because the fuel is later sold by a tribe to final consumers?

2) Should the Court abandon the *White Mountain Apache* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependent upon congressional intent?

3) Did the court of appeals err in applying the *White Mountain Apache* interest balancing test by, *inter alia*, placing dispositive weight on the fact that a tribally-owned gas station derives income from largely non-tribal patrons of the tribe's nearby casino?

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OPINIONS BELOW

The August 11, 2004, decision of the United States Court of Appeals for the Tenth Circuit is reported at 379 F.3d 979 (10th Cir. 2004), and is included in the petition appendix. The decisions of the District Court are reported at 241 F. Supp. 2d 1295 (D. Kan. 2003), and 2003 WL 21536881 (D. Kan. 2003). These decisions are included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals issued its decision in this case on August 11, 2004. This petition has been filed within ninety (90) days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 provides that

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

Kan. Stat. Ann. § 79-3402 (1997) provides that

> The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing

> and repairing the public highways, including the payment of bonds issued for highways included in the state system of this state, and the cost and expenses of the director of taxation and the director's agents and employees incurred in administration and enforcement of this act and for no other purpose whatever.

Kan. Stat. Ann. § 79-3408(a) (Supp. 2003) provides that:

> A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.

Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) provides that:

> Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein. . . .

STATEMENT

1. *Nature of the Suit*. Kansas imposes a tax on the receipt of motor fuel by distributors, manufacturers and importers for use, sale or delivery in Kansas for any purpose whatsoever. Kan. Stat. Ann. § 79-3408(a) (Supp. 2003). Distributors, importers and manufacturers, not retailers or ultimate consumers, bear the tax's legal incidence and are responsible for remitting it to the State. *Id.* § 79-3408(c) (Supp. 2003). When the Kansas Department of Revenue attempted to collect the tax with respect to motor fuel received by the tribe's distributor off-reservation, the respondent (a federally-recognized tribe) filed suit in federal court. The tribe sought declaratory and injunctive relief against the Secretary of the Kansas Department of Revenue in his official capacity. The tribe invoked the court's jurisdiction under 28 U.S.C. §§ 1331, 1362, and 1367(a).

2. *The District Court Proceedings*. The District Court granted the Secretary's Motion for Summary Judgment and denied the tribe's request for reconsideration. Pet. App. 23.

In making these rulings, the District Court held:

a. The State has a fundamental, sovereign interest in its system of taxation. Pet. App. 52.

b. The legal incidence of the State tax at issue falls on the distributor, not the tribal retailer. Pet. App. 45.

c. Because the State exercised its tax jurisdiction off-reservation, the State's interests were at their strongest and exceeded the economic interests of the tribe which were, comparatively, at their weakest. Pet. App. 47-48.

d. The State provides services to the taxpayer (the fuel distributor), chief among which is a four-lane State Highway 75 used to access the tribe's gasoline station. Pet. App. 48.

e. Simply selling finished gasoline near the tribe's casino does not generate value on the reservation sufficient to supersede the State's interest in its system of off-reservation taxation. Pet. App. 47.

3. *The Court of Appeals' Decision.* The Court of Appeals, reviewing the District Court's decision *de novo*, reversed. Pet. App. 1.

a. Whether the balance-of-interests test is appropriate when a State exercises jurisdiction off-reservation.

The Court of Appeals concluded that the balance-of-interests test is appropriate to analyze, and ultimately strike, the State tax imposed off-reservation. Pet. App. 6.

b. Abandonment of balance-of-interests test.

The Court of Appeals concluded that circuit precedent precluded their addressing the State's request to abandon the balance-of-interests test. Pet. App. 7.

c. The Court of Appeals' balancing.

The Court of Appeals acknowledged that the State tax was imposed off-reservation against a non-tribal member (*i.e.* the distributor), Pet. App. 5, but nevertheless concluded, that the Kansas tax, as applied, is preempted by implication as incompatible with and outweighed by the strong tribal and federal interests against the tax. The tribal and federal interests noted by the court were the generalized interest in economic viability of the tribe. Pet. App. 12-13. The Court of Appeals principally relied upon the fact that approximately three-quarters of the tribal gas station's customers were either casino patrons or employees and that the station's revenues therefore were, "'derived from value generated on the reservation by

activities involving the tribes and when the taxpayer is the recipient of tribal services.'" Pet. App. 7-8 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156-57 (1980)). Additionally, the Court of Appeals distinguished this Court's decision in *Colville* because the tribe maintains a one-and-a-half mile access road from State Highway 75 to the tribe's gas station, Pet. App. 11, and because the tribe sold its gasoline within two cents of the prevailing local market rate, Pet. App. 9-10.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Directly Conflicts with Controlling Precedent from This Court Concerning Applicability of the *White Mountain Apache* Balancing Test, and Creates a Sharp Schism With Other Federal Circuit Courts of Appeals and One State Supreme Court.

The Court of Appeals determined that a nondiscriminatory state tax, imposed off-reservation on non-tribal entities that do business with Indian tribes and that pass the cost of those taxes on to the tribes, is preempted under the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

As a practical matter, the Court of Appeals has now invoked preemption-by-implication as an appropriate standard to reach beyond a tribe's geographical reservation boundary and strike an otherwise lawful, nondiscriminatory State tax imposed off-reservation. This was error.

White Mountain Apache, however, involved the on-reservation activity of a non-Indian company. This Court addressed only the "difficult question" of applying state law to the on-reservation activity of non-Indians when it announced its preemption analysis that embodies the balance-of-interests test. This Court thus cited the settled rule three years later in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), that "[o]ur cases have recognized that tribal sovereignty contains a 'significant geographical component,'" *id.* at 335 n.18, and, as a result, held that "the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary,'" *id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 148-49 (1973)).

Given *White Mountain Apache's* express recognition of that rule, states have operated on the assumption that, at a *minimum*, they are free to apply their nondiscriminatory laws off-reservation, even against tribes or their members without reference to an *ad hoc* and amorphous test used to resolve the validity of on-reservation state taxation of nonmembers doing business with tribal entities. *See Mescalero Apache Tribe,* 411 U.S. at 148-49 ("State authority over Indians is yet more extensive over activities . . . not on any reservation. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). This basic tenet applies equally to State taxation. *Id.* at 149.

The Court of Appeals' decision significantly, and wrongly, alters the legal landscape created by *White Mountain Apache* and *Mescalero Apache*. The decision

below leaves substantial doubt concerning a State's ability to regulate or tax Indians off-reservation through nondiscriminatory laws (including tax laws). Further, States cannot now even be reasonably assured of their sovereign authority to regulate or tax non-Indians off-reservation through taxation. The Court of Appeals' decision dramatically departs from controlling authority from this Court, and sharply veers away from other circuits' decisions.

The Court of Appeals' decision significantly contracts the States' sovereign power to tax off-reservation transactions, constitutes a marked departure from the path-marking *Mescalero Apache Tribe*, and conflicts with First and Ninth Circuit holdings that the balance-of-interests test does not apply to off-reservation transactions. *Narragansett Indian Tribe v. Narragansett Elec. Co.,* 89 F.3d 908, 915 (1st Cir. 1996) (If the housing site is not Indian country, there is no bar to the exercise of the State's jurisdiction.); *Blunk v. Ariz. Dep't of Transp.*, 177 F.3d 879 (9th Cir. 1999) (federal preemption does not bar states from regulating the activities of non-Indians outside of Indian country); *In re Blue Lake Forest Prods., Inc.*, 30 F.3d 1138, 1141 & n.6 (9th Cir. 1994) (federal preemption prong of the Indian preemption doctrine applies to on-reservation conduct and general preemption standards apply to off-reservation activities).

The question whether balancing is required in considering State jurisdiction off-reservation was also considered by the New Mexico Supreme Court. The New Mexico Court noted that it was unable to discover any direction by this Court that preemption-by-implication, an exception to the general doctrine that preemption must be by an explicit act of Congress, applies to activities which occur off-reservation. It thus held that exemptions from State

tax by implication are permitted only where the taxed activity of the non-Indian occurred on-reservation. *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. State*, 107 N.M. 399, 402, 759 P.2d 186, 189 (1988). Citing controlling authority that privileges of tribal sovereignty do not extend beyond the political and geographical boundaries of a sovereign, the New Mexico court held that in reviewing State taxation of activities of non-Indians *off the reservation*, an actual conflict with an express federal provision is required. *Id.* at 402.

The appeal of the *Rodey* decision to this Court was dismissed by this Court for lack of a substantial federal question. 490 U.S. 1043 (1989). Thus, its holding is controlling authority here. *Hicks v. Miranda*, 422 U.S. 332 (1975).

In sum, the Tenth Circuit's decision creates a palpable conflict between the First and Ninth Circuits and the New Mexico Supreme Court for purposes of S. Ct. R. 10(a).

Finally, the pernicious effect of the Court of Appeals' reasoning on the States' administration of their tax laws must be emphasized. If the decision below is not reversed, before exercising tax jurisdiction with respect to an off-reservation transaction, States will have to ascertain whether the exercise of such jurisdiction might have an indirect economic effect on a tribe's proprietary interests. Such a judicially mandated inquiry is an affront to State sovereignty, *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*, 515 U.S. 582, 586 (1995) ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *Dows v. Chicago,* 11 Wall. 108, 110 (1871). ("It is upon taxation that

the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.")

The Court of Appeals' holding wrongly cuts a wide swath through significant, fundamental interests of State sovereignty that have been pivotal in our system of federalism for well over a century and a half.

The Court of Appeals' analysis and holding are wrong and insupportable. Indeed, the error is so manifest and creates such significant, adverse consequences for the States that reversal is warranted. This Court's decision in *Mescalero Apache Tribe* and *Colville* expressly rejected the reasoning upon which the Court of Appeals relied in this case, as well as its holding.

Finally, the Court of Appeals' decision erroneously exposes the States' system of taxation to unwarranted vulnerability as a practical matter. In any suit brought by a tribe involving off-reservation state taxation, tribes will presumably be able to bring all manner of claims alleging that state action off-reservation against Indians or non-Indians has an adverse economic effect on the tribe which, *inter alia*, "harms" the tribe, and thus preempts the state's sovereign, off-reservation authority to tax. This too is untenable under our system of federalism.

Thus, reversing the Court of Appeals' error in this case is not just a nicety of legal reasoning, but a practical necessity. Kansas respectfully requests that the Court reverse the Court of Appeals erroneous holding on this issue.

II. The Perpetual Uncertainty in Lines of Demarcation and Lack of Meaningful, Clear Guidance that is Absolutely Critical to States in the area of Taxation, Dictates That the *White Mountain Apache* Balancing Test Be Replaced in the Taxation Context with a Preemption Analysis Based on the Principle that Indian Immunities are Dependent Upon Congressional Intent.

In order to finance their governments, provide services, and properly administer programs for their citizens, States need clarity in jurisdictional limitations, certainty in rules of application and consistency of results. The balance-of-interests test is seriously deficient on all counts.

It has become abundantly clear that the *White Mountain Apache* interest-balancing test laid down almost 25 years ago is simply unworkable. Justice (now Chief Justice) Rehnquist's dissent in *Colville* was prescient in this regard. The judiciary has become log-jammed with protracted litigation in which neither side can, nor will, acknowledge that the balance of interests favors the other. This flight to litigation is encouraged by the balance-of-interests test itself, which has devolved into a case-by-case, highly subjective test whose results are plainly unpredictable. As previously noted, no circuit or state supreme court has used the balance-of-interests test to strike a lawful, nondiscriminatory State tax imposed off-reservation against non-Indians. In light of *Mescalero Apache*, which allows States to impose nondiscriminatory tax laws off-reservation even against Indians, the decision by the Court below to use the balance-of-interests test to strike a State tax imposed off-reservation against a non-Indian can

only be characterized as dramatically unpredictable as well as unprecedented.

More to the point, the fact that States must now ascertain whether their off-reservation taxation may have an economic effect on a tribe is plainly impracticable. For example, the test requires States to make determinations of whether an off-reservation transaction is taxable prior to the transaction even occurring on facts that a State cannot possibly know and whose potential effects are unknown. This simply exceeds the capability of any official or institution. The only way that a State will be able to "know" about transactions occurring off-reservation and the economic effects on tribes is when a tribe sues the State alleging harm. Thus, the real world result of the balance-of-interests test has become a nearly one hundred percent guarantee of protracted litigation. A test should be designed to mitigate conflict, not be the catalyst for litigation. This concern was rightly noted by Chief Justice Rhenquist in *Colville*, and has become all the more urgent today.

By way of example, a paradigm of the multi-layered complexity attendant to the *White Mountain Apache* analysis in a taxation context is *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). There, a majority of a Ninth Circuit three-judge panel upheld application of an Arizona business transaction tax imposed on-reservation on the lessee of a tribally-owned hotel and gaming facility. In so holding, the majority listed the factors that it considered as militating for and against preemption:

In our case the following facts favor preemption:

1. The fee is held by the United States in trust for the Tribe.

2. The Tribe has furnished the site for the Hotel.

3. The Tribe has ownership of the Hotel, its facilities, and all improvements.

4. The Tribe has a residual interest in the assignment of the lease.

5. The Tribe, with the help of the federal government, furnished approximately 11 percent of the construction cost of the Hotel.

6. Since 1992 the Tribe has operated on the premises of the Hotel slot machines and automated poker games which attract some patrons to the Hotel.

7. The income from the lease contributes to the economic well-being and self-sufficiency of the Tribe.

8. The Secretary of the Interior has approved the leases involved.

Factors weighing against preemption are the following:

1. There is no evidence of employment by the Hotel of any members of the Tribe. The district court said that the record was not clear on this point. It was the Tribe's burden to provide evidence of tribal employment if there was any. PCC had agreed to prefer tribal members in hiring. The Hotel employs between 150 and 200 persons. The manager of the Hotel was not aware of any employee from the Tribe.

2. The bulk of the funding for the Hotel came from non-tribal and non-federal sources.

3. The tribal contribution to the quality of the food served at the Hotel is minimal – an inspection two or three times a year.

4. The Tribe receives only a guaranteed 1-¼ percent of the Hotel's gross revenues. The record does not reveal what it has received in terms of the 20 percent of net revenues. As the Tribe's expert Joseph Kalt stated, this return is "subject to capital recapture provisions."

5. The Tribe does not have an active role in the business of the Hotel.

6. The State provides these services to the Hotel:

> (a) The criminal law governing the operation of the Hotel, such as the statutes on fraud, on checks and credit cards, and on embezzlement.
>
> (b) The law governing liens . . . and other security instruments such as the mortgages by which the Hotel is financed.
>
> (c) The law governing employment at the Hotel, including the workman's compensation law specifically referenced by the lease.

Id. at 1111-12 (citations omitted). A dissenting judge reasoned, similarly to the Tenth Circuit here, that the state tax was preempted because of (1) the tribe's "'active role in *generating activities of value* on its reservation[;]'" (2) the federal interest reflected in the leasing of tribal trust lands, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and a Housing and Urban Development grant that financed the hotel's construction; and (3) the

conclusion that "the state does not provide the overwhelming 'majority' of services and does not provide services "critical" to the Hotel's success." *Id.* at 1114-16 (Pregerson, J., dissenting).

As can be seen from just this one case, the permutations of facts and circumstances in any given situation are legion, indeed, incalculable. Any variation of fact or circumstance, no matter how slight, could, in some court's mind, tip the "balance" in the opposite direction. It cannot be disputed that such *ad hoc* "interest balancing" is a recipe for unguided judicial picking-and-choosing which leaves state legislatures and tax administrators with no real guidance in attempting to conform their actions with applicable federal common law.

States simply cannot administer their statutes effectively when one party can change circumstances or create novel theories that ostensibly "shift" the balance against the State tax. States need a clear, bright-line test. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995). Balancing simply does not provide it. The appropriate approach is instead to follow a straightforward standard similar to the one approved in *United States v. New Mexico*, 455 U.S. 720, 733 (1983), permitting States to impose otherwise nondiscriminatory taxes on entities that do business with the Federal Government even though the economic burden of the tax may ultimately be borne by the Government. *See Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37-38 (1999).

The standard imposed by the Court of Appeals upon States now is that because the United States has a generalized interest in tribal economic viability, State taxes, even those imposed off-reservation against non-Indians,

that may have an indirect economic effect on tribes, are void. Pet. App. 12-13. Such a categorical bar to State taxation has been rejected by this Court. *Colville*, 447 U.S. 134, 154-56 (1980).[1]

The Court of Appeals could only reach its conclusion by contorting the balance-of-interests test because there is no controlling authority to support the Court of Appeals' leap in logic. However, the balance-of-interests test provides no discernible limitation on lower courts to avoid such judicial legislation. And this is the peril, the Achilles

[1] Curiously, this Court has rejected the notion that a generalized federal interest in tribal economic development, an interest the Court of Appeals here found dispositive, as an overriding force preempting an otherwise valid State tax on non-Indian activity, even on-reservation. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154-56 (1980). ("The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes. The Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*, evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.") *Colville's* precedent has been followed by the Ninth Circuit in *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 739 (9th Cir.), *cert. denied*, 516 U.S. 868 (1995) ("The federal government has expressed an interest in assisting tribes in their efforts to achieve economic self-sufficiency. However, that interest does not, without more, defeat a State tax on non-Indians.") *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) ("The promotion of tribal economic development has long been recognized as an important federal interest. However, as noted by the State, the Supreme Court has rejected it as an overriding force preempting an otherwise valid State tax on non-Indians.")

heel, of the balance-of-interests test. It has evolved into a beauty is in the eye of the beholder test.

While, as developed in Part III below, the lower court's interest-balancing analysis cannot be squared with this Court's reasoning in, *inter alia, Colville,* the fact remains that the *White Mountain Apache* approach fosters such judicial free-wheeling. Taxation, however, perhaps more than any other area of the law, needs clarity and something more definitive than a subjective, randomly applied standard.

To appreciate the unmanageability of the Court of Appeals' use of the balance-of-interests test to strike the State tax here, all of the cases on which the Court of Appeals relied are simply inapplicable, or, at the very least, clearly distinguishable, from this case in fundamental respects.

The Court of Appeals, while ignoring the fundamental differences from the case at bar, relies on *Colville*; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); and, *Chickasaw Nation*, to support its conclusion that the balance-of-interests test operates to strike the State tax imposed off-reservation. However, each of those cases involve either (1) state regulation of activity occurring on tribal land; or (2) a requirement that tribes collect and remit taxes to the State from transactions arising on-reservation; or, (3) both.

In this case, by contrast, the only connection between the Kansas tax and the tribe is that some distributors sell motor fuel to the tribe and may charge a price that reflects the tax's economic burden. The State is not attempting to regulate any activity on tribal lands, is not attempting to exercise jurisdiction over the tribe or its members, and is

not even requiring the tribes to collect and remit taxes to the State.

In this case, the District Court correctly determined – and the Court of Appeals did not dispute – that the State's exercise of jurisdiction through the legal incidence of the Kansas tax at issue falls on non-Indian distributors on transactions occurring off-reservation, rather than on the tribe. Pet. App. 45. Indeed, no other conclusion seems possible here, given that the tax is not imposed on any activity occurring on tribal lands and the tribe is not required to collect or remit the tax to the State.[2]

Not able to find controlling authority that strikes State jurisdiction imposed against non-tribal members off-reservation, the Court of Appeals, using the balance-of-interests test as its justification, instead rested its decision on the notion that the transient economic burden of an off-reservation State tax harmed the tribe's economic viability (*i.e.* its profits); and that, in and of itself, was sufficient to preempt the State tax.

The Court of Appeals conclusion was created out of whole cloth via the balance-of-interests test. It is the only way that the State tax could be preempted, because there was no controlling authority to support any other method of preemption.

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[2] Whether the legal incidence of tax as a "frequently dispositive question" as determined by this Court in *Chickasaw Nation* retains its vitality is presented by the petition for writ of certiorari in *Hammond v. Couer d'Alene Tribe*, No. 04-___, with respect to the judgment in *Coeur d'Alene Tribe v. Hammond*, ___ F. 3d ___ 2004 WL 1852897 (9th Cir. 2004) filed simultaneously with this writ.

The Court of Appeals' holding in this case as stressed above, clears the way for a host of tribal challenges to State taxes (or any State regulation) that are not imposed on tribes but that may indirectly affect tribes and non-Indians who do business with tribes. For example, an increase in gasoline distributors' State property, sales or income taxes generally result in an increase in the price that distributors charge their customers for gasoline. Because the tribal retailers may pay higher prices for their gasoline as a result, the Court of Appeals' reasoning allows tribes to challenge any State tax that their supplier has to remit to the State, the legal incidence of which clearly falls upon distributors. The chaos that will result from following the Court of Appeals' reasoning has already occurred in Kansas.

For example, based on the Court of Appeals' decision in *Sac and Fox v. Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001), distributors in Kansas are required to remit fuel taxes on fuel delivered to tribal gas stations owned by three (3) other Kansas tribes, even though those gas stations also sit near other tribally owned businesses. *Id.* at 583. Now, however, the same Court of Appeals has said that because this gas station sits near a tribally owned business, notions of tribal immunity can reach across reservation boundaries and strike the same precise tax imposed off-reservation on the same precise distributor.

The Court of Appeals' approach opens the door for tribes to continue to manipulate facts or create novel theories and re-litigate until they hit upon the right combination that, in the Court of Appeals' eyes, merits striking the off-reservation State tax in question. Common

sense, if not judicial reasoning, cries out that the balance-of-interests test needs to be abandoned.

Indeed, the District Court, following controlling precedent from this Court and the Tenth Circuit and looking at the same precise facts came to a conclusion that is 180 degrees from the Court of Appeals' decision. A test that yields such widely disparate results within the same circuit provides no guidance whatsoever to States in their on-going efforts to plan governmental functions and administer their laws.

The balance-of-interests test itself has predestined this outcome. The test itself has created uncertainty and confusion in the lower courts resulting in conflicting decisions emanating from facts that at their core are not so vastly different. This is not the purpose of a rule that is supposed to bring clarity and applicability to future, analogous cases. Tax administration requires predictability. *Chickasaw Nation*, 515 U.S. at 459-60. While there are many words that could be used to describe the balance-of-interests test, predictability is not one of them.

Kansas asks this Court to abandon the balance-of-interests test in favor of a straight, federal preemption standard based on congressional intent similar to the standard recognized in *United States v. New Mexico*. Such an approach provides clear guidance, clear lines of demarcation and clear, readily applicable results. There is, in this regard, no substantial justification for imposing a less stringent preemption standard with respect to Indian tribes or their members than for the Federal Government. *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 847 (1982) (Rehnquist, J., dissenting) (criticizing application of *White Mountain Apache* where holding

"accord[ed] a dependent Indian tribal organization greater tax immunity than it accorded the sovereignty of the United States a short three months ago in a case involving the precise state taxes at issue here").

Adoption of a federal preemption based on congressional intent such as expressed in *New Mexico* will recognize the States' compelling interest in a predictable sphere of taxing authority and the inappropriateness of rebalancing that interest from case to case. This approach, lastly, comports in rationale and result with the "categorical" rule (*Chickasaw Nation*, 515 U.S. at 450) adopted by the Court against direct state taxation of tribes and their members with respect to reservation transactions absent congressional authorization. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n.17 (1987) (because "the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak[,] . . . it is unnecessary to rebalance these interests in every case").

III. In Sharp Contrast to Decisions from Other Circuits, and Contrary to Controlling Precedent from This Court, the Court of Appeals' Decision Wrongly Placed the Tribe's Economic Interest in a Position Superior to the State's Strong, Fundamental Interest in its System of Off-reservation Taxation.

The Court of Appeals misapplied the *White Mountain Apache* interest-balancing test by misconstruing the "value-generated-on-reservation" element discussed in *Colville*. The Court of Appeals reasoned that because the tribe's gas station sits near the tribe's casino, and because casino patrons are drawn to the gas station by the casino,

then such proximity creates "value generated on the reservation" sufficient to trump the state tax imposed on off-reservation transactions.

Colville, however, actually stated that "[w]hile the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." 447 U.S. at 156-57. In contrast, "[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id.* at 157.

It is clear from a plain reading of *Colville* that the discussion of the "value generated" topic by the *Colville* Court was only addressing the limited question of the State and tribe taxing the same taxpayer, on the same transaction, on-reservation.

Unlike the situation in *Colville*, the Kansas tax in this case is paid not by the ultimate consumer – *i.e.*, the gas station patron – but the distributor that not only conducts its business off-reservation generally but also is taxed upon the *receipt* of fuel – a transaction that takes place off-reservation. In contrast, the tribe's fuel tax here is imposed on the ultimate consumer on the reservation.

In this case, we have two different taxes imposed at two different points in time on two different transactions on two different sets of taxpayers on two different values. By contrast, the Court of Appeals' rationale improperly expands *Colville*, which only addressed a situation in which both the State and tribe were taxing the same

taxpayer on the reservation on the same value. The basis of the *Colville* decision is not present in the facts and circumstances of this case. By expanding *Colville* beyond its express, limited application, the Court of Appeals has wrongly misapplied the analysis and holding of *Colville*.

Moreover, the Court of Appeals ignored the fact that the State taxpayer, the distributor here, and the tribe's patrons are afforded many State benefits, chief of which is four-lane State Highway 75 to get to the tribe's gas station.[3] That State highway is paid for with State fuel taxes. Kan. Stat. Ann. § 79-3402 (Supp. 2003). *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 336 (1983). ("[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention"). The significance of this reality was noted by the District Court, Pet. App. 48, but appears to have been lost on the Court of Appeals.

Rather, the Court of Appeals placed entirely too much weight on the one and a half mile access road built by the tribe from State Highway 75 to the tribe's gas station and the claim that the tribe's gas station would have few customers if not for the casino. Indeed, the Court of Appeals' decision leads one to the conclusion that all of these gas station patrons simply spend their time driving up and down that mile and a half access road. The Court of Appeals overlooked a prior panel's decision that customers of tribally operated gas stations largely use State highways and services paid for by State fuel taxes. *Sac and Fox Nation v. Pierce*, 213 F. 3d 566, 585 and n.15 (10th Cir. 2000).

[3] While it is the largest roadway on and near the tribe's reservation, State highway 75 is only one of many State and local roads paid for by State motor fuel taxes on and near the tribe's reservation that patrons use to get to the tribe's casino.

Ironically, the tribe's access road (and its gas station and its casino) would have no value whatsoever if the State had not built and maintained State Highway 75 that the tribal access road abuts with the very fuel taxes that have now been preempted. How many casino patrons would be "drawn" to the tribe's gas station or casino if they had to walk to the access road instead of using a modern, four lane, state-of-the-art State built and maintained highway? While this was a key factor for the District Court and the prior Circuit panel in *Sac and Fox Nation*, the Court of Appeals' decision here is strangely silent.

These critical distinctions aside, the Court of Appeals improperly viewed *Colville* as authorizing invalidation of a state tax merely because, in its view, the purchasers were drawn to the gas station because of a nearby tribally operated business.

Colville, and later cases including, most importantly, *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989), clearly stand for the proposition that a State may tax a nonmember doing business with a tribe when it provides governmental services benefiting the taxpayer, and here Kansas built and maintained the road system that allowed the distributors and patrons to access the gas station – a road system paid for by the State fuel tax.

Taxation is a core sovereign interest of the States. The real effect of the Court of Appeals' decision here is to preclude the collection of a validly enacted State tax, a tax which is not even imposed on the tribes and does not require their assistance in collecting, thereby depriving the State of substantial tax revenue that it would otherwise

collect. Our system of federalism simply does not support such a conclusion.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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United States Court of Appeals
Tenth Circuit.

AUG 11 2004

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PRAIRIE BAND POTAWATOMI NATION,

Plaintiff-Appellant,

v. No. 03-3218

STEPHEN S. RICHARDS, Secretary
of the Kansas Department of Revenue,

Defendant-Appellee,

WINNEBAGO TRIBE OF NEBRASKA,
HCI DISTRIBUTION, THE KICKAPOO
TRIBE OF INDIANS OF THE KICKAPOO
RESERVATION IN KANSAS, THE IOWA
TRIBE OF KANSAS AND NEBRASKA,
AND THE SAC AND FOX NATION
OF MISSOURI,

Amici Curiae.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 99-CV-4071-JAR)

David Prager, III, Tribal Attorney, Prairie Band Potawatomi Nation, Mayetta, Kansas, for Plaintiff-Appellant.

John Michael Hale, Special Assistant Attorney General, Kansas Department of Revenue, Topeka, Kansas, for Defendant-Appellee.

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Before LUCERO, McKAY, and HARTZ, Circuit Judges.

McKAY, Circuit Judge.

This case addresses whether federal law prohibits Kansas from collecting its state tax on fuel supplied to an Indian tribe by a non-Indian distributor. Prairie Band Potawatomi Nation (the "Nation") sought to invalidate the fuel tax on grounds that it is preempted by federal law and that it infringes on the Nation's rights of self-government. The district court granted summary judgment for the Secretary of the Kansas Department of Revenue (the "Secretary"), and the Nation brought this appeal.

Facts

The following facts are undisputed. The Nation is a federally-recognized Indian tribe whose reservation is on United States trust land in Jackson County, Kansas. Aplt. App., Vol. I, at 35. On its reservation, the Nation financed, constructed, and now owns and operates a $35 million casino. *Id.*, Vol. II, at 70. By building this casino, the Nation increased the number of people who travel to this otherwise remote and rural area. *Id.* at 70-71. To accommodate casino patrons and other reservation-related traffic, the Nation financed and built a gas station (the "Nation Station") which is close to the casino and on the same federal trust land. In building the Station, the Nation incurred $1.5 million in construction costs, which included the purchase of a motor fuel handling system with tank storage and monitoring systems to make fuel available to customers. *Id.*, Vol. III, at 22. The Nation Station is tribally-owned and operated, and, as of May 2000, eleven of its fifteen employees were Indians, with seven of those being Nation tribal members. *Id.* at 2-3. The Nation submitted expert testimony, which the Secretary does not dispute, that "the 'value marketed' by [the] Nation Station results from the business generated by the casino and from employees of the casino and [the Nation's] government and residents." *Id.*, Vol. II, at 86. This conclusion is supported by the undisputed evidence that seventy-three percent of the Nation Station's fuel customers are casino patrons and casino employees and another eleven percent live or work elsewhere on the reservation. *Id.*; *Id.*, Vol. V, at 46; Aple. Br. at 5. The Nation's expert also reported that the Station is a location-dependent business because, "[b]ut for the casino, there would not be enough traffic to support [it] in its current location." Aplt. App., Vol. II, at 86. The Nation Station sells fuel at fair market

prices. Therefore, it cannot and does not advertise an exemption from state fuel taxes. The Nation's expert concluded that "the Nation is not 'marketing a tax exemption' because the price of fuel at the Nation Station is set above cost, including the Nation's tax, and within 2¢ per gallon of the price prevailing in the local market." *Id.* at 84. The Nation also submitted two affidavits – one from the Station's manager and one from the Nation's Treasurer and Tax Commissioner – that support this conclusion. *Id.* at 71; *Id.*, Vol. III, at 161. The Secretary has not controverted the Nation's expert opinion or the Nation's affidavits and does not argue that the Nation sells fuel below market prices.

The Nation imposes a tax on the Station's fuel sales: 16 cents per gallon of gasoline and 18 cents per gallon of diesel (increased to 20 cents for gasoline and 22 cents for diesel in January 2003). Aplt. App., Vol. IV, at 207; Vol. V, at 169. The Station provides the Nation with its sole source of fuel revenue, which amounts to about $300,000 in tribal fuel taxes each year. Aplt. App., Vol. III, at 3. Pursuant to the Nation's Motor Fuel Tax law, this fuel revenue is used for "constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation." *Id.*, Vol. IV, at 208. This includes maintenance on the road that connects the United States Highway 75 to the Nation's casino. The Nation receives no financial assistance from Kansas to maintain this stretch of roadway.

Discussion

In this dispute, the Nation challenges the 1995 amendment to the Kansas Motor Fuel Tax Act. Kan. Stat. Ann. §§ 79-3401 to 79-3464f (1997). Pursuant to this

amendment, the Kansas Department of Revenue began collecting, for the first time, a tax on motor fuel distributed to Indian lands. The Kansas legislature structured the tax so that its legal incidence is placed on non-Indian distributors. Kan. Stat. Ann. § 79-3408(c); *Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 580 (10th Cir.2000). But, the distributors are allowed to pass the tax directly to retailers, like the Nation Station. Kan. Stat. Ann. § 79-3409 ("Every distributor paying such tax or being liable for the payment shall be entitled to charge and collect an amount, including the cost of doing business that could include such tax on motor vehicle-fuels . . . sold or delivered by such distributor, as part of the selling price.") The Nation brought suit to enjoin the Secretary from imposing the tax on the Nation's fuel, and the district court granted summary judgment for the Secretary. We review a district court's grant of summary judgment *de novo* to determine whether there is a genuine issue as to any material fact and whether a party is entitled to judgment as a matter of law. *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1175 (10th Cir. 2001); *Sac and Fox,* 213 F.3d at 583.

The Nation asks us to invalidate the tax as it applies to the Nation's fuel under two independent but related doctrines. First, the Nation argues that federal law preempts the tax because federal and tribal interests against state taxation outweigh Kansas' interests in imposing the tax. Second, the Nation argues that the tax is invalid because it impermissibly infringes on its rights of self-government. Either of these doctrines would be sufficient to invalidate the Kansas fuel tax as applied here. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980).

We first address whether the tax is preempted by federal law. The constitutional source of federal preemption is Article I, Section 8, Clause 3, which provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." When preemption analysis is applied to Indian cases, we consider the unique origins of tribal sovereignty and how it differs from state sovereignty. *Bracker,* 448 U.S. at 143. Specifically, "[a]mbiguities in federal law have been construed generously in order to comport with [the] traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* at 143-44 (citing *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 174-75, and n.13 (1973)). "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertions of State authority." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983).

In cases like this – where a tribe is challenging a state tax – "[t]he initial and frequently dispositive question . . . is who bears the legal incidence of a tax." *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458 (1995). "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. However, where, as here, "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy. . . ." *Id.*

Although the Secretary argues that the balancing of interests test should be abandoned, citing Justice (now Chief Justice) Rehnquist's partial dissent in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 176-80 (1980), circuit precedent requires us to use this balancing test. *See Sac and Fox,* 213 F.3d at 583. The balancing test is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker,* 448 U.S. at 145.

Applying these principles, we conclude that the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax. The Nation's interests are particularly strong. Tribes have a recognized "interest in raising revenues for essential governmental programs, [and] that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville,* 447 U.S. at 156-57.

Here, the Nation's fuel revenues are derived from value generated primarily on its reservation. In determining reservation value, the unique facts of this case require us to look beyond the physical fuel (the Nation receives its fuel in "ready to sell" condition) and to view the Nation's fuel sales as an integral and essential part of the Nation's on-reservation gaming enterprise. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 219-20 (1987) (balancing tribal and state interests by examining the bingo enterprise as including the facilities and ancillary

services offered to patrons); *Bracker,* 448 U.S. at 145-51 (weighing the tribe's general economic interest in its timber industry to invalidate a state motor carrier license tax and a use fuel tax applied to non-Indians doing business with the tribe); *Indian Country U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n,* 829 F.2d 967, 986 (10th Cir. 1987) (weighing the tribe's interest in its bingo enterprise as a "form of entertainment"); *Gila River Indian Community v. Waddell,* 967 F.2d 1404, 1410 (9th Cir. 1992) (weighing the state interests in taxing tickets to on-reservation events and concessionary items against the tribes' "involvement in the production of the entertainment events which take place on its reservation").

The close nexus between the Nation's fuel sales and its gaming enterprise is critical to our analysis here. When we recently reviewed the Kansas fuel tax as it applied to a tribe's retail station alone, we held that "the revenues resulting from the Tribes' retail fuel sales to non-Indian consumers traveling from outside Indian lands is not derived from value 'generated on the reservations by activities in which the Tribes have a significant interest.'" *Sac and Fox,* 213 F.3d at 585 (quoting *Colville,* 447 U.S. at 155) (remanding to develop an adequate record to balance tribal and state interests). There, we also held that we would not invalidate the state tax solely on the ground that it would decrease tribal sales to non-Indians, particularly where the tribes' "fuel market exists only because of the Tribes' claimed exemption from the [state] fuel tax." *Id.* Here, in contrast, the Nation's fuel sales are derived from value generated on its reservation because its fuel marketing is integral and essential to the gaming opportunity the Nation provides. Also, unlike in *Sac and Fox,* the Nation's fuel market does not exist because of a

claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities. This is clear from both the undisputed expert testimony that the Station's fuel market only exists because of the Nation's casino and from the undisputed fact that seventy-three percent of the Station's fuel patrons are casino patrons and employees. For these reasons, we balance the competing interests by viewing the Nation's fuel revenues as being derived primarily from value generated on its reservation.

In balancing the interests, both the district court and the Secretary heavily relied on *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), to conclude that Kansas' interests in taxation outweigh the competing federal and tribal interests. Aplt. App., Vol. V, at 64-65; Aple. Br. at 30-31. In *Colville,* the Court upheld state taxes applied to on-reservation retail sales of cigarettes and tobacco products because "[w]hat the smokeshops offer . . . is solely an exemption from state taxation." *Id.* at 155. "It is painfully apparent," the Court said, "that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* The Court then validated the state tax, holding that "[w]e do not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.*

We distinguish *Colville* in two critical ways. First, in stark contrast to the smokeshops in *Colville,* the Nation is not marketing an exemption from state taxes. The undisputed

evidence is that the Nation sells its fuel at fair market prices. Aplt. App., Vol. II, at 71, 84; Vol. III, at 161. Thus, a central component to the reasoning of *Colville* is inapplicable here.

Second, unlike in *Colville,* the Nation is not merely importing a product for resale to non-Indians; rather, the revenues from the Nation's fuel to non-Indian consumers are derived from value "generated on the reservation [] by activities in which [the Nation has] a significant interest." *Colville,* 447 U.S. at 155. It is undisputed that when the Nation financed and built its $35 million casino to attract non-Indian patrons, it created a new fuel market for an otherwise remote area. After creating this new market, the Nation financed and built the Station to offer fuel to its casino patrons and other reservation-related traffic.

The Supreme Court has acknowledged this second distinction when it distinguished *Colville* where tribes "are not merely importing a product onto the reservations for immediate resale to non-Indians" but have created an entertainment enterprise designed to attract non-Indian consumers onto its reservation. *Cabazon,* 480 U.S. at 219. In *Cabazon,* the Supreme Court held that the federal and tribal interests outweighed state interests in regulating bingo and other games because, unlike in *Colville,* the tribes have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games. *Id.* As in *Cabazon,* the Nation built a modern casino and ancillary services, like

the Nation Station, in order to offer its patrons an attractive entertainment opportunity. Here, seventy-three percent of the Nation Station's fuel customers are casino patrons and employees. Aplt. App., Vol. II, at 86. These patrons, like those in *Cabazon,* spend extended amounts of time using the entertainment services offered by the Nation. Thus, the Nation's fuel revenues are derived from activities – that is, drawing non-Indians to its gaming enterprise – in which the Nation has a significant interest.

The Nation's interests here are strengthened because of its need to raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure without state assistance. It is undisputed that the Nation's only source of fuel revenue comes from the Nation Station. *Id.,* Vol. III, at 3. Fuel revenue is typically used to pay for a government's infrastructure expenses, and, in this case, the Nation's Motor Fuel Tax law specifically requires that all fuel revenue (approximately $300,000 per year) be used for "constructing and maintaining roads, bridges and rights-of-way located on or near the reservation." *Id.,* Vol. IV, at 208. The Nation has the financial responsibility for the majority of the roads and bridges on and near its reservation. *Id.,* Vol. III, at 22-23. Of particular importance here, the Nation has an ongoing and future responsibility to maintain the stretch of roadway that connects the United States 75 Highway (the main highway leading to the reservation) with the casino. *Id.* at 23. "The Nation spent approximately $1.2 million in 1997 and 1998 to improve and pave 1 1/2 miles of 150th Road from the casino to U.S. 75 Highway and to make major improvements to the 150th Road and U.S. 75 Highway intersection." *Id.* Thus, the Nation used its fuel revenues to provide better access from the main federal highway to its

casino. Kansas does not contribute funds to cover the costs of maintaining this access road.

The Secretary argues that the Nation could continue collecting fuel revenues from the Nation Station by imposing its tax in addition to the state tax. But the Nation's expert explained that this is not economically feasible. He reported that [b]asic economic theory teaches that the [Nation Station] cannot charge prices high enough to allow collection of both the Kansas and [the Nation's] fuel taxes. Motor fuel is a commodity and cannot be differentiated enough to permit disparate pricing in the same geographic market. Therefore, the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Nation Station's] fuel business to virtually zero. Aplt. App., Vol. II, at 89. The Secretary has not submitted contradictory evidence and has not argued that this opinion is either incorrect or exaggerated. The "economic realities of the situation [] both in the presence and absence of the motor fuel tax" are relevant in balancing the competing interests. *Sac and Fox,* 213 F.3d at 585; *see also Colville,* 447 U.S. at 157-58 (noting that a tribe bears the burden of showing that its smokeshop businesses would be significantly reduced absent a credit for tribal taxes paid). This economic reality adds to the Nation's already strong interests against taxation.

The Nation's interests in this case are aligned with strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments. These federal goals are stated in numerous Acts of Congress, Executive Branch policies, and judicial opinions. *See generally* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2001); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2001); Indian Self-Determination

and Education Assistance Act of 1975, 25 U.S.C. § 450f (2001); *see also* Presidential Proclamation 7500 of November 12, 2001, 66 Fed. Reg. 57641 (Nov. 15, 2001) ("We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities."); Presidential Executive Order 13175, 65 Fed. Reg. 67249, Consultation and Coordination With Indian Tribal Governments, § 2(c), (Nov. 6, 2000) ("[T]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."); *Bracker,* 448 U.S. at 143-44 (noting "a firm federal policy of promoting tribal self-sufficiency and economic development" as evidenced by various congressional enactments); *Colville,* 447 U.S. at 155 (recognizing "varying degrees [of] congressional concern with fostering tribal self-government and economic development").

Against these strong tribal and federal interests, the sole interest Kansas asserts is its general interest in raising revenues. Of course, states have a "legitimate governmental interest in raising revenues, and that interest is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville,* 447 U.S. at 157. Here, Kansas' interest is not at its strongest. The tax is directed at fuel which, under the particular circumstances of this case, is derived primarily from value generated on the reservation. Also, Kansas does not provide any financial assistance in maintaining the access roadway from the United States 75 Highway to the casino. The ongoing and future obligation to upkeep this stretch of roadway is exclusively the Nation's, and the Nation's only source of fuel revenue (which is designated for this obligation) comes from the Station.

Under these facts, Kansas' generalized interest in raising revenues is insufficient to justify its tax.

Therefore, we invalidate the Kansas Motor Fuel Tax as it applies to the Nation's fuel because the balance of tribal, federal, and state interests prohibits state taxation as a matter of law. Although Kansas has a legitimate interest in raising revenue, this general interest is insufficient to justify the tax under these particular facts because it interferes with and is incompatible with strong tribal and federal interests against taxation.

REVERSED.

United States District Court,
D. Kansas.
PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen S. RICHARDS, Secretary of the
Kansas Department of Revenue, State of Kansas,
in his official capacity, Defendant.
No. 99-4071-JAR.
July 2, 2003.

Indian tribe moved for reconsideration of decision, 241 F.Supp.2d 1295, which denied its action for relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. The District Court, Robinson, J., held that (1) district court did not rely on allegedly objectionable evidence in making its ruling, and (2) request that court rule that tribe had a constitutional and self-government right to impose tribal taxes with respect to motor fuel sold on reservation, did not warrant reconsideration.

Motion denied.

ROBINSON, J.

This matter is before the Court on Plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) brought pursuant to Fed.R.Civ.P. 59(e). Plaintiff asks this Court to reconsider and alter its order granting defendant's motion for summary judgment (Doc. 73).

I. BACKGROUND

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose

reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,[1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Fuel sales made to casino patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales via a tribally imposed tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel.

In addition to the tribal fuel tax, the Kansas Department of Revenue collects motor fuel tax on fuel distributed to the Nation Station pursuant to the Kansas Motor Fuel Tax Act.[2] The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.[3]

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe

[1] 25 U.S.C. § 2701 *et seq.*

[2] *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

[3] Kan. Stat. Ann. § 79-3409.

claimed that the Indian Commerce Clause,[4] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas[5] or other federal law prohibited imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. The defendant moved for summary judgment and its motion was granted by this Court on January 15, 2003.[6]

In granting defendant's motion for summary judgment, the Court found that neither the doctrine of federal preemption or the doctrine of tribal rights to self-government prevented the state from imposing taxation on the fuel sold at the Nation Station. The Court further found that the Kansas Act for Admission did not prevent the state from imposing its own tax on fuel sold at the Nation Station. Plaintiff now asks the Court to reconsider its judgment. For the reasons discussed below, plaintiff's request is denied.

II. STANDARD OF REVIEW

A court may reconsider and alter a prior judgment if it is necessary to correct manifest errors of law or fact or to accept newly discovered evidence.[7] However, this does not include a review of arguments or evidence that could and should have been presented through the summary judgment

[4] U.S. CONST. art. I, § 8 cl. 3.

[5] *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

[6] *See Prairie Band Potawatomi Nation v. Richards*, 241 F.Supp.2d 1295, 1308 (D.Kan.2003).

[7] *Buell v. Security General Life Ins. Co.*, 784 F.Supp. 1533, 1536 (D.Colo.1992), *aff'd* 987 F.2d 1467 (10th Cir.1993).

process.[8] Likewise, it is inappropriate to re-visit issues that have already been addressed.[9] There is no entitlement to a second chance when a party has failed to present its strongest case in the first instance.[10] Three grounds for reconsideration are generally recognized: (1) an intervening change in controlling law, (2) availability of newly discovered evidence, and (3) a need to correct clear error or prevent manifest injustice.[11] Deciding whether to grant or deny a motion to alter or amend a judgment is within the court's discretion.[12]

III. DISCUSSION

Plaintiff's motion to reconsider first asserts that the Court erred in granting defendant's motion for summary judgment because the Court relied on defense exhibits that plaintiff had objected to in "Plaintiff's Objections to Defendant's Witness and Exhibit List" (Doc. 54). While plaintiff's objections to defendant's witness and exhibit list sought to preclude defendant from using objectionable evidence at trial, plaintiff's response to defendant's motion for summary judgment incorporated some of the objections as they related to those exhibits supporting defendant's

[8] *Steele v. Young*, 11 F.3d 1518, 1520 n. 1 (10th Cir.1993); *Wolfgang v. Mid-American Motorsports, Inc.*, 914 F.Supp. 434, 438 (D.Kan.1996); *Buell*, 784 F.Supp. at 1536.

[9] *Comeau v. Rapp*, 810 F.Supp. 1172, 1175 (D.Kan.1992).

[10] *Anspach v. Tomkins Indus., Inc.*, 817 F.Supp. 1499, 1518 (D.Kan.1993), *aff'd* 51 F.3d 285 (10th Cir.1995) (Table).

[11] *See e.g., Eichenwald v. Krigel's, Inc.*, 908 F.Supp. 1531, 1564-65 (D.Kan.1995).

[12] *Bancamerica Comm. Corp. v. Trinity Indus., Inc.*, No. 90-2325-GTV, 1995 WL 646790, at *1 (D.Kan. Oct.19, 1995) (citing *Hancock v. City of Oklahoma*, 857 F.2d 1394, 1395 (10th Cir.1988)).

motion for summary judgment. On page seven of its response to defendant's motion for summary judgment, plaintiff asserts, "The Nation objects to Defendant's Exhibits 2-6 for all of the reasons stated in Plaintiff's Objections to Defendant's Witness and Exhibit List filed herein on October 30, 2000."

The exhibits that plaintiff objected to contain information regarding the services provided to the reservation such as education, fire and police support. Plaintiff now seeks a Court order sustaining its objections to defendant's witness and exhibit list and in turn, plaintiff asks the Court to reconsider its ruling on defendant's motion for summary judgment. The Court declines plaintiff's proposition to rule on its objections to defendant's witness and exhibit list because contrary to plaintiff's assertions, the Court did not rely on defendant's supposed objectionable exhibits in ruling on defendant's summary judgment motion.

Plaintiff contends that the Court relied on objectionable evidence because in Footnote 94 of the Court's order, the Court noted that, "the State also provides services on and near the reservation including maintenance of U.S. Highway 75 . . . fire and police protection." The Court first notes that plaintiff's response to defendant's motion for summary judgment does not dispute that these services exist. Instead, plaintiff simply disputes the extent to which the state services are more "significant, substantial or valuable" when considered in relation to tribal services.[13] Secondly, and more importantly, the Court's statement

[13] Plaintiff's Response to Defendant's Motion for Summary Judgment at 5 (Doc. 59).

regarding state services on and near the reservation was collateral to its actual holding.

In granting defendant's motion for summary judgment, the Court ruled that the state was not preempted from imposing its own fuel tax on fuel sold at the Nation Station. The Court determined that the evidence favoring the state's interest in imposing the motor fuel tax was so one-sided that the defendant was entitled to prevail as a matter of law. The Court's holding was largely premised on the fact that the state fuel tax was imposed on the sale of non-Indian products to non-Indian consumers.[14]

In reaching this conclusion, the Court noted that the legal incidence of the Kansas motor fuel tax undisputably falls on non-Indian distributors.[15] In addition, the Court rejected plaintiff's contention that fuel sold at the Nation Station was an Indian product because the tribe operates a casino in close proximity to the Nation Station. Finally, the Court noted that while the legal incidence of the tax falls on the distributors, the ultimate burden of the tax falls on consumers, the majority of which are non-Indian and are provided governmental services by the state off the reservation. The Court's statement regarding state services on and near the reservation was simply an attempt to reveal that the small number of fuel purchasers who live or work on the reservation receive some state services. Thus, the Court finds this is not an issue that

[14] *Prairie Band Potawatomi Nation v. Richards,* 241 F.Supp.2d 1295, 1308 (D.Kan.2003).

[15] *See Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 580 (10th Cir.2000) (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

requires this Court to correct clear error or prevent manifest injustice.

Plaintiff's second request in its motion for reconsideration is that the Court make a ruling finding that the plaintiff has a constitutional and federal self-government right to impose tribal taxes with respect to motor fuel sold on the reservation. It is clear from the Court's order granting summary judgment that such a ruling has already been made. In its order, the Court found that "[t]here is no question that the Tribe's power to tax transactions occurring on trust lands 'is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law. . . .'"[16] The Court further found that despite plaintiff's right to tax transactions on reservation land, the tribe cannot "oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business."[17] Thus, the Court ruled in accordance with plaintiff's request, and there is nothing to reconsider.

Plaintiff's final request is that the Court reverse its judgment and enter judgment for plaintiff. The Court finds that plaintiff fails to proffer any grounds or argument justifying reconsideration. At best, plaintiff's motion merely rehashes arguments previously considered and rejected by the Court.[18] As such, the Court declines to

[16] *Prairie Band Potawatomi Nation,* 241 F.Supp.2d at 1311 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)).

[17] *Id.*

[18] *See Resolution Trust Corp. v. Greif,* 906 F.Supp. 1446, 1456-57 (D.Kan.1995) (noting a motion to reconsider is not a mechanism to raise

(Continued on following page)

revisit settled issues. In sum, plaintiff has not presented any instances of manifest error or mistake warranting reconsideration of the Court's prior ruling. Plaintiff's motion shall be denied.

IT IS THEREFORE BY THIS COURT ORDERED that plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) is denied.

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arguments that should have been raised in the first instance or to rehash arguments previously considered and rejected by the court).

United States District Court,
D. Kansas.
PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen RICHARDS, Secretary of the Kansas Department of Revenue, State of Kansas, Defendant.
No. 99-4071-JAR.
Jan. 15, 2003.

Indian tribe brought action for declaratory and injunctive relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. State moved for summary judgment. The District Court, Robinson, J., held that: (1) Court had jurisdiction to hear tribe's claim; (2) tribe had standing to bring action; (3) Hayden-Cartwright Act did not amount to Congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations; (4) state was not barred by federal preemption from imposing tax; (5) tribe's interest in raising revenues did not outweigh state's interests; and (6) Kansas Act for Admission did not bar imposition of tax.

Motion granted.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Robinson, District Judge.

This action is before the Court on defendant's Motion for Summary Judgment (Doc. 49). Plaintiff has filed a Response (Doc. 59) and defendant has filed a Reply (Doc. 68). The Court has reviewed the parties' filings and is now prepared to rule.

I. FACTS

The following facts are taken from the record and are either stipulated, uncontroverted or viewed in the light most favorable to plaintiff's case. The Court ignores factual assertions that are immaterial, or unsupported by affidavits and/or authenticated and admissible documents. The Court also disregards conclusory statements.

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,[1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Once the fuel arrives on the reservation, the Nation Station unloads, stores, monitors and dispenses the fuel. Fuel sales made to casino patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales.

The Tribe imposes a tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel. The Nation Station is subject to $300,000 in tribal fuel taxes per year. The Tribe spends revenue from the fuel tax to construct and maintain roads, including the road leading from U.S. Highway

[1] 25 U.S.C. § 2701 *et seq.*

75 to the Tribe's casino and other roads on and near the reservation. The Tribe also provides government services including law enforcement, fire protection, emergency services, education services, urban planning, court services and other miscellaneous services. Prior to May of 1995, the Kansas Department of Revenue did not collect motor fuel tax on fuel distributed to Indian lands. Then, in 1995, the Kansas legislature amended the Kansas Motor Fuel Tax Act[2] and the Department of Revenue began to impose fuel tax on fuel distributed to Indian tribes on tribal land. The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.[3]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[4] A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law."[5] A "genuine"

[2] *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

[3] Kan. Stat. Ann. § 79-3409.

[4] Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir.1993).

[5] *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

factual dispute requires more than a mere scintilla of evidence.[6]

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact.[7] Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof."[8] The nonmoving party may not rest on its pleadings but must set forth specific facts.[9]

"[The court] must view the record in a light most favorable to the parties opposing the motion for summary judgment."[10] Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative.[11] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[12]

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[6] *Id.* at 252, 106 S.Ct. 2505.

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir.1991).

[8] *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991).

[9] *Applied Genetics*, 912 F.2d at 1241.

[10] *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991).

[11] *Anderson*, 477 U.S. at 250-51, 106 S.Ct. 2505.

[12] *Id.* at 251-52, 106 S.Ct. 2505.

III. DISCUSSION

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe claims that the Indian Commerce Clause,[13] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas[14] or other federal law prohibits imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. Defendant asserts that summary judgment should be granted because the State is entitled to Eleventh Amendment immunity,[15] the Tribe lacks standing, and the Hayden-Cartwright Act provides congressional consent for imposition of the State's fuel tax.[16] Defendant also asserts that there is no material issue of fact concerning whether the state fuel tax is preempted by federal law, whether the state fuel tax improperly infringes upon the Tribe's sovereign right to self-government, or whether the Kansas Act for Admissions bars imposition of the tax. The Court will take each of defendant's contentions in turn.

A. Jurisdiction and the Eleventh Amendment

The Tribe asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1362,[17] which grants

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[13] U.S. CONST. art. I, § 8 cl. 3.

[14] *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

[15] U.S. CONST. amend. XI.

[16] 4 U.S.C. § 104.

[17] The Tribe also claims jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331.

district courts original jurisdiction over civil actions brought by federally-recognized Indian tribes wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Defendant argues that despite the grant of jurisdiction in § 1362, the Eleventh Amendment bars the Tribe's claims. Defendant also asserts that *Ex parte Young*,[18] a legal fiction created to overcome the Eleventh Amendment's bar under certain circumstances, is inapplicable in this case. As discussed below, defendant's arguments are unfounded.

The Eleventh Amendment grants states sovereign immunity from suits in federal court brought by the state's own citizens, citizens of another state, citizens of a foreign state, suits by other sovereigns and suits by an Indian tribe.[19] In *Ex parte Young,* the Supreme Court created a legal fiction, circumventing Eleventh Amendment immunity for suits seeking injunctive and declaratory relief against state officers, sued in their official capacity, to enjoin an alleged ongoing violation of federal law.[20] Defendant contends that the *Ex Parte Young* exception is inapplicable in this case because the relief being sought by the Tribe implicates special sovereignty interests.

[18] 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[19] *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); *Principality of Monaco v. Mississippi,* 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934); *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

[20] *Ex parte Young,* 209 U.S. at 155-56, 28 S.Ct. 441; *see also Alden v. Maine,* 527 U.S. 706, 747-48, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (affirming the continuing validity of *Ex parte Young*).

Defendant points to the Supreme Court case *Idaho v. Coeur d'Alene Tribe of Idaho,*[21] wherein the Court ruled that the *Ex parte Young* exception could not be entertained when the relief requested would be as much of an intrusion on state sovereignty as an award of money damages. In *Coeur d'Alene,* the tribe sought a declaratory judgment against the state establishing its right to quiet enjoyment to submerged lands located within the boundaries of the Coeur d'Alene Reservation.[22] The tribe also sought injunctive relief against various state officials to prevent them from exercising regulatory jurisdiction over the submerged land. The Court determined that the tribe's claims were the functional equivalent to a quiet title action and if relief was granted, it would have divested the state of substantially all regulatory power over the land at issue.[23] Thus, the Court found that the requested relief would affect Idaho's sovereign interests "in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," defeating plaintiff's *Ex parte Young* action.[24]

Soon after the Supreme Court's *Coeur d'Alene* decision, the Tenth Circuit decided *ANR Pipeline Co. v. Lafaver,*[25] where it held that the states' power to assess and levy personal property taxes on property located within its borders implicated special sovereignty interests, defeating an *Ex parte Young* action. In so holding, the Tenth Circuit interpreted *Coeur d'Alene* as requiring a new two-step analysis for determining whether *Ex parte Young* applies

[21] 521 U.S. 261, 287, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

[22] *Id.* at 264-65, 117 S.Ct. 2028.

[23] *Id.* at 265, 117 S.Ct. 2028.

[24] *Id.* at 287, 117 S.Ct. 2028.

[25] 150 F.3d 1178, 1193 (10th Cir.1998).

in any given case. According to *ANR Pipeline,* federal courts are to first "examine whether the relief being sought against a state official implicates special sovereignty interests."[26] If the answer to the first inquiry is affirmative, the court "must then determine whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment."[27]

Relying on *Coeur d'Alene* and the *ANR Pipeline,* defendant asserts that an *Ex parte Young* action does not apply in this case because the relief sought by the Tribe implicates special sovereignty interests in the State's system of taxation and the requested relief would be the functional equivalent to money damages against the State. The Court finds defendant's reliance on these cases is misplaced. To rule otherwise would be to ignore the long line of cases decided in federal court relating to state taxation on tribal affairs.[28] As the Ninth Circuit pointed out in *Agua Caliente Band of Cahuilla Indians v. Hardin,*[29] "in the context of state taxation of *tribes,* there are preemption considerations and *competing* sovereignty interest, the merits of which are governed by a long line of cases." The issues presented by state taxation of tribal

[26] *Id.* at 1190 (citations and quotations omitted).

[27] *Id.*

[28] *See e.g., Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Moe v. Confederated Salish and Kootenai,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

[29] 223 F.3d 1041, 1048 (2000).

interests were not present in either *ANR Pipeline* or *Coeur d'Alene,* both of which have been limited to their particular facts.[30] Thus, the Court finds that an *Ex parte Young* action is appropriate under the circumstances of this case.

In the alternative, the Tenth Circuit has ruled that Indian tribes, asserting jurisdiction under 28 U.S.C. § 1362, may seek injunctive relief from state taxation in federal court.[31] In *Sac and Fox,* the Tenth Circuit contemplated, under a set of facts very similar to those at hand, whether Indian tribes could maintain suits in federal court to enjoin collection of the State of Kansas's motor fuel tax. Relying on the Supreme Court's decision in *Moe v. Confederated Salish and Kootenai Tribes,*[32] the court determined that neither the Eleventh Amendment nor the Tax Injunction Act, 28 U.S.C. § 1341, barred the tribes' suit.[33] The court reached this conclusion notwithstanding the Supreme Court's decision in *Seminole Tribe of Florida v.*

[30] *Robinson v. Kansas,* 117 F.Supp.2d 1124, 1136-37 (D.Kan.2000) (noting that Tenth Circuit has made it clear that finding a special sovereignty interest such as those found in *ANR Pipeline* and *Coeur d'Alene* is the exception not the rule) (citing *Buchwald v. Univ. of New Mexico Sch. of Medicine,* 159 F.3d 487 (10th Cir.1998); *Elephant Butte Irrigation Dist. v. Dept. of the Interior,* 160 F.3d 602 (10th Cir.1998); *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619 (10th Cir.1998); *Ellis v. Univ. of Kansas Med. Ctr.,* 163 F.3d 1186, 1198 (10th Cir.1998); *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir.1999).

[31] *See Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 571-73 (10th Cir.2000). *See also Sac and Fox Nation of Missouri,* 979 F.Supp. 1350, 1352-53 (D.Kan.1997).

[32] 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (upholding an Indian tribe's right to seek injunctive relief from state taxation in federal court).

[33] *Sac and Fox,* 213 F.3d at 572.

Florida,[34] finding that the *Seminole Tribe* Court had expressly recognized that in *Moe* it had reached a different conclusion due to the fact that the case involved an Indian tribe's access to federal court for the purpose of obtaining injunctive relief from state taxation.[35] Based on the *Moe* decision, the Tenth Circuit reasoned that federal courts have jurisdiction under 28 U.S.C. § 1362 to consider the merits of the Kansas fuel tax case.[36] Like the Tenth Circuit, this Court asserts jurisdiction under § 1362 and finds the Eleventh Amendment does not bar this suit.

As instructed by the Tenth Circuit in *Sac and Fox*, this Court has jurisdiction and the Eleventh Amendment does not bar the Tribe's claim brought pursuant to § 1362. Further, based on the legal fiction created in *Ex parte Young*, the Court finds that it has jurisdiction to hear this dispute. Therefore, summary judgment is not appropriate based on the State's Eleventh Amendment immunity.

B. Standing

Under Article III, § 2 United States Constitution, Federal courts have jurisdiction to hear a matter only if an actual "case or controversy" exists.[37] In determining

[34] 517 U.S. 44, 72-73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Article I of the United States Constitution, including the Indian Commerce Clause, does not provide sufficient authority for Congress to abrogate that State's Eleventh Amendment immunity).

[35] *Sac and Fox*, 213 F.3d at 571 (citing *Blatchford*, 501 U.S. at 784, 111 S.Ct. 2578).

[36] *Sac and Fox*, 213 F.3d at 572.

[37] U.S. CONST. art. III, § 2.

whether a case or controversy exists, the Court must evaluate whether the Tribe has standing to sue.[38]

As stated by the Tenth Circuit in *Sac and Fox*, the Constitutional standing question addresses "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant its invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on its behalf."[39] To meet the standing requirement, the Tribe must allege "1) a concrete and particularized actual or imminent injury, 2) which is fairly traceable to the defendant's conduct, and 3) which a favorable court decision will redress."[40] In addition to the above mentioned requirements, the Supreme Court has enunciated several other prudential standing requirements. First, a plaintiff must assert its own rights and not those of others.[41] Next, a plaintiff will not meet the standing requirement if he or she asserts a "generalized grievance shared by a large class of citizens."[42] Finally, the interest which a plaintiff wants protected must be within the "zone of interests to be protected by the statute or Constitutional guarantee."[43]

[38] *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

[39] *Sac and Fox*, 213 F.3d at 573 (citations and quotations omitted).

[40] *Id.* (citing *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)).

[41] *Id.* at 573 (citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

[42] *Id.* (quoting *Warth*, 422 U.S. at 499, 95 S.Ct. 2197).

[43] *Id.* (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)).

Defendant argues that the Tribe lacks standing to bring this case because the tax in question falls on the distributors, not the Tribe.[44] The Court finds that the Tenth Circuit's decision in *Sac and Fox* settles this issue.

Addressing the exact arguments made by defendant here, the *Sac and Fox* court held that a tribe has standing to sue a state in federal court where the tribe alleges particularized imminent economic injury due to the state's imposition of the fuel tax.[45] In *Sac and Fox,* the state alleged that the tribes did not have standing to bring suit challenging the Kansas motor fuel tax because the legal incidence of the tax falls on the distributors of the fuel rather than on the tribal retailers. The court rejected this argument stating that the court had "little difficulty concluding that the Tribes [have] constitutional standing to maintain their suit against the State."[46]

Like the tribes in *Sac and Fox,* the Tribe here meets the standing criteria to challenge the State's fuel tax.[47] First, the Tribe provides affidavits claiming injury including

[44] *See Sac and Fox,* 213 F.3d at 580 (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

[45] *Id.* at 573-74. The Court acknowledges that the case cited by defendant, *Carter v. Montana Dept. of Transp.,* 274 Mont. 39, 905 P.2d 1102 (1995), where the court held a fuel retailer did not have standing to challenge the state fuel tax when the legal incidence of the tax falls on the distributor, is somewhat in contrast to the Tenth Circuit's decision in *Sac and Fox.* Despite the value of the case to defendant's position, the Court finds it is bound by Tenth Circuit precedent, not by Montana Supreme Court precedent. Further, the *Carter* case can be distinguished because the gas station in question was not tribally owned and the case was not brought by the tribe, it was brought by an individual Indian.

[46] *Sac and Fox,* 213 F.3d at 573.

[47] *See id.* at 573-74.

interference with the right of self government and economic injury caused by the state fuel tax. Next, the alleged injury is directly traceable to the State's desire to impose a fuel tax,[48] in that the Act allows the tax to be passed on directly to the retailers.[49] Finally, deciding in favor of the Tribe will redress the alleged injury because if the distributors who distribute fuel to the Nation Station are not required to pay the tax, there will be no threat of passing the tax through to the Tribe.[50]

Further, like in *Sac and Fox,* the prudential standing principles discussed above do not bar the Court's exercise of jurisdiction.[51] First, the Tribe asserts its own rights to be free from the cost of motor fuel tax. The fact that the consumers and fuel distributors will unquestionably benefit if the Tribe is successful in challenging the tax, does not alter the Court's analysis.[52] Next, because the Tribe has asserted its right to be free from the fuel tax, it is not asserting a "generalized grievance" prohibiting the Court from exercising jurisdiction.[53] Finally, the Tribe's alleged economic interest in being free from taxation is arguably within the "zone of interest" that federal law seeks to protect.[54] In grappling with the "zone of interest" prudential requirement for standing, the Tenth Circuit noted that federal law has long sought to "protect tribal

[48] *Id.* at 574.

[49] *See* Kan. Stat. Ann. § 79-3409.

[50] *Sac and Fox,* 213 F.3d at 574 (citing Kan. Stat. Ann. § 79-3409).

[51] *See id.*

[52] *See id.*

[53] *Id.*

[54] *Id.*

self-government from state interference, including state taxation."[55]

Based on the above analysis, the Court finds that the Tribe has demonstrated that it has standing to bring this action in federal court. Therefore, summary judgment will not be granted on defendant's challenge to the Tribe's standing.

C. Hayden-Cartwright Act, 4 U.S.C. § 104

Defendant argues that pursuant to the Hayden-Cartwright Act, 4 U.S.C. § 104, Congress consented to the states' power to tax fuel distributions to Indian tribes, leaving the Tribe without recourse to challenge the tax. In pertinent part § 104(a) of the Act states:

> All tax levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military *or other reservations,* when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State

[55] *Id.* (citing *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 170-71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)).

> . . . within whose borders the reservation may be located.[56]

The State argues that the phrase "other reservations" includes Indian lands and that the term "licensed trader" specifically refers to tribal retailers. The Tribe counters that the Act is ambiguous and that ambiguity should be construed in favor of Indian sovereignty. Unfortunately, the Court is left with little guidance from the Circuit Courts or the Supreme Court in determining whether Congress intended the phrase "other reservations" to include Indian reservations.[57] Only the Idaho Supreme Court and the United States District Court for the District of Idaho have struggled with this difficult issue.[58] Although the Court is not bound by either of these decisions, the Court finds the decisions persuasive and holds that the Hayden-Cartwright Act does not amount to congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations.

The Court begins its analysis by noting that a state may not levy taxes on Indian tribes or individual Indians inside Indian country without express approval of Congress.[59] Because of the "unique trust relationship" between

[56] (Emphasis added).

[57] *Sac and Fox,* 213 at 576 ("Neither the Supreme Court nor any of the circuit courts of appeals, nor any court as far as we can discern, has addressed the difficult question of whether Congress intended 4 U.S.C. § 104(a) to encompass Indian lands.")

[58] *Coeur D'Alene Tribe v. Hammond,* 224 F.Supp.2d 1264 (D.Idaho 2002); *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n,* 136 Idaho 53, 28 P.3d 996 (2001), *cert denied,* 534 U.S. 1129, 122 S.Ct. 1068, 151 L.Ed.2d 971 (2002).

[59] *See County of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251, 258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)

(Continued on following page)

the United States and Indian Nations, statutes that affect Indians are to be "construed broadly, with any ambiguous provision to be interpreted to their benefit."[60] Unless Congress makes it abundantly clear that it intends to grant taxing authority to the states, the Court must construe the statute as not allowing the taxation of Indians.[61]

Defendant argues that the language in the Hayden-Cartwright Act expressly approves state taxation of fuel delivered in Indian country. The Tribe argues that Congress did not expressly approve state taxation of motor fuel on Indian reservations and that the statute is, at best, ambiguous. Thus, the Tribe argues that the statute must be construed in favor of the Tribe and interpreted so as to not grant such taxing authority. Following the principles elucidated above, the Court agrees with the Tribe and finds that the Hayden-Cartwright Act does not expressly provide for state taxation on fuels delivered in Indian country. Defendant argues that the language in the Act, which allows for state taxation of motor fuels sold on

("['A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a state is without power to tax reservation lands and reservations Indians.") (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 764, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their territory.")

[60] *Hammond*, 224 F.Supp.2d at 1268 (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985); *McClanahan*, 411 U.S. at 174, 93 S.Ct. 1257).

[61] *Hammond*, 224 F.Supp.2d at 1268.

"United States military or other reservations,"[62] includes Indian reservations. The Court is not persuaded by defendant's argument. As noted by United States District Court for the District of Idaho in *Hammond*, the term "reservation" has broad meaning and may or may not include Indian reservations.[63] The *Hammond* court explained that the term reservation has been used in land law to describe any body of land which Congress has reserved from sale.[64] The term has also been used to describe "military bases, national parks and monuments, wildlife refuges, and federal property."[65]

Additionally, as articulated by the Idaho Supreme Court in *Goodman Oil*, if Congress intended to include Indian lands in the pertinent part of the statute, § 104(a), it would have done so. The Act uses the phrase "Indian Lands or other federal reservations" in section three and the phrase "Indian reservation roads" in section six.[66] Congress's use of these distinct phrases convinces this Court that Congress could have specified that the entire Act was to apply to Indian reservations or Indian lands but did not. Therefore, by not using the word "Indian Reservation" in the applicable part of the Act, § 104(a), the language of the Act does not clearly show that Congress intended to allow state taxation of tribal fuel.[67]

[62] 4 U.S.C. § 104(a).

[63] *Hammond*, 224 F.Supp.2d at 1269.

[64] *Id.* (quoting *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

[65] *Id.*

[66] *See Goodman Oil*, 28 P.3d at 1000.

[67] *Id.*

Defendant also argues that the use of the term "licensed traders" equates to Indians or Indian traders, lending support for the position that Congress intended to allow states to tax in Indian country. The Court disagrees with defendant and finds that use of the term "licensed traders" is also ambiguous and therefore does not support defendant's position that the Act expressly grants states the authority to tax fuel on Indian reservations. As noted by the *Goodman Oil* court, at the time the Hayden-Cartwright Act was passed, the term licensed traders could have meant licensed sellers of malt beverages, licensed retailers on government reservations or licensed traders selling goods on all government reservations.[68] So, once again the term used by Congress is too broad to have the effect of conveying upon states the right to tax Indians. Congress could have used the term licensed Indian traders had it meant to grant states the authority to tax fuel on Indian reservations.

Defendant also urges the Court to resolve any ambiguities in the language of the Act by turning to the Act's legislative history and the executive interpretation of the Act. Defendant insists that the Court is required to defer to agency interpretation of a statute as required by the Supreme Court's decision in *Chevron U.S.A., Inc v. Natural Resources Defense Council.*[69] Defendant argues that the stated purpose of the statute, and two agencies' interpretations show, that the Act applies to Indian reservations.

[68] *Id.* (citing *Falls City Brewing Co. v. Reeves,* 40 F.Supp. 35 (D.Ky.1941)).

[69] 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Again, the Court disagrees. The Court will address defendant's arguments regarding the legislative history and agency interpretation in turn.

First, defendant draws the Court's attention to legislative history explaining the intended purpose of the Act. The purpose of the Act, which was passed in 1936, was to fund the extension of highway construction and maintenance. Congress intended to correct the general unfairness in the sale of fuel exempt from state taxation on federal reservations. The legislative history discussing the purpose of the Act never specifically refers to Indian reservations.[70] Instead, the legislative history only discussed the inequities of selling gasoline free of state tax in "post exchange stores" and "government reservations." Once again, defendant contends that the use of the term government reservations was meant to include Indian reservations. As discussed above, the Court is not convinced that the use of the term "government reservations" includes Indian reservations. Further, as noted by the *Hammond* court, simply because Congress expressed its intent to give up the federal government's exemption from state motor fuel taxes, does not mean Congress was willing to sacrifice the Indians' exemption from the tax as well.[71]

Next, defendant calls the Court's attention to the opinions of the Attorney General and Solicitor of the

[70] *See* 80 CONG. REC. 8, 8701 (remarks of Congressman Whittington) ("In post exchange stores and on government reservations, gasoline and motor fuel is being sold free from local taxes. The conferees believe that all local taxes should be collected except when the gasoline or motor vehicle fuels are for the exclusive use of the United States. . . .").

[71] *Hammond,* 224 F.Supp.2d at 1269.

Department of Interior, alleging that the opinions clarify any ambiguity contained in the language of the statute Four months after the Act was passed in 1936, the Attorney General stated that the Act applied to a "military reservation, or an Indian reservation. . . ."[72] Also, the Solicitor of the Department of the Interior concluded that the Act authorizes state taxation of sales of motor fuel purchased on a reservation for tribal enterprise for resale both to non-Indians and members of the tribe.[73]

These statements suggest that the Attorney General and the Solicitor of the Department of Interior believed that the Act applied to Indian reservations, but as discussed in *Goodman Oil,* these statements are not sufficient to clarify the ambiguities contained in the Act.[74] The Attorney General Opinion of 1936 dealt with whether national parks fell within the Act and mentions "Indian Reservations" in passing.[75] The entire passage reads "some of the agencies which are expressly designated in Section 10 apparently are such as usually pertain to military, naval, or Indian reservations and that section does not expressly mention national parks."[76] The qualifier of "apparently" lends weight to this Court's conclusion that the Attorney General's interpretation is ambiguous.

The opinion of the Solicitor of the Department of the Interior is equally ambiguous. Referencing the Act, the

[72] 38 U.S. Op. Atty Gen. 522, 524 (1936).

[73] Application of Federal and State Taxes to Activities of Menominee Indian Mills, 57 Interior Dec. 129, 138-40 (1940).

[74] *Goodman Oil,* 28 P.3d at 1000-01.

[75] *See id.*

[76] 38 U.S. Op. Atty Gen. 522, 524 (1936).

Solicitor said "[i]t is not clear, however, whether the Government agencies specified are intended to include such federal agency as the Menominee tribal enterprise and whether the reference to reservations includes Indian reservations."[77] While the Solicitor eventually concluded that the taxes could be levied in the circumstances before him, his statement shows that he also found the Act ambiguous.

Further, as noted in *Goodman Oil* and *Hammond,* Congress has recently attempted to pass legislation to authorize the state taxation of fuel sales on Indian reservations.[78] Such an attempt was apparently a recognition by Congress that more precise language would be necessary to grant states the authority to tax fuel on Indian reservations. If Congress intended the Hayden-Cartwright Act to allow for state taxation of fuel on Indian reservations, it is unlikely that Congress would continue to propose bills to permit a tax it apparently already allowed.

Interpreting ambiguities in the Act in favor of the Tribe, the Court finds that the language of the Act does not show that Congress consented to taxation of the Indian reservations. The Court is further not persuaded by defendant's arguments relating to the legislative history or subsequent agency interpretation of the Act. Because Congress must be explicit if it intends to grant states the power to tax within Indian country, and because the Court finds Hayden-Cartwright does not provide for an explicit

[77] 57 Interior Dec. 129 at 138 (1940).

[78] *Hammond,* 224 F.Supp.2d at 1269 (citing H.R. No. 3966, 105th Cong.2d Sess. (1998); S. 550 106th Cong. (1999)); *Goodman,* 28 P.3d at 1001.

grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations, defendant's request for summary judgment on this issue is denied.

Because the Hayden-Cartwright Act is not a basis for summary judgment and because there is no jurisdictional bar preventing the Court from moving forward, the Court must now turn to the merits of the case.

D. Preemption and Tribal Self-Government

Two separate but distinct doctrines pose a barrier to the assertion of state taxation over transactions occurring on reservation land: federal preemption and tribal rights to self-government.[79] These doctrines manifest themselves from the broad authority given to Congress to regulate tribal affairs under the Indian Commerce Clause and from "the semi-independent" position of Indian tribes.[80] The Tribe asserts these doctrines bar the State from imposing its motor fuel tax on fuel delivered to the reservation. The Court is required to analyze the barriers posed by these doctrines independently because either doctrine, standing alone, can be a sufficient basis for holding that Kansas's motor fuel tax is invalid as it relates to fuel delivered to the Tribe's reservation.[81]

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[79] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

[80] *Id.*

[81] *Id.*

1. Preemption

It is settled law that a state tax is unenforceable if the legal incidence of the tax falls on an Indian tribe or its members for sales made within Indian country.[82] If, however, the legal incidence of the tax rests on non-Indians, as it undisputably does here, "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and the federal law is not to the contrary, the State may impose its levy."[83] Because the legal incidence of the Kansas motor fuel tax falls on non-Indians, the Court is required to determine if a material issue of fact exists as to whether the balance of the federal, state and tribal interests tilt in favor of the Tribe. The Court must grant defendant's motion for summary judgment if the Court finds the evidence favoring the State's interest in imposing the motor fuel tax is so one-sided that defendant is entitled to prevail as a matter of law.[84]

Ordinarily, when state taxes are imposed on the sale of non-Indian products to non-Indian consumers, the balance of the federal, state and tribal interests tilt in

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[82] *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) ("[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, 'a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held a State is without power to tax reservation lands and reservation Indians.' ").

[83] *Chickasaw Nation,* 515 U.S. at 459, 115 S.Ct. 2214.

[84] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

favor of the state.[85] In *Washington v. Confederated Tribes of the Colville Indian Reservation,* the Supreme Court held that while federal policy seeks to foster tribal self-government and economic development, it does not preclude state taxation of sales by Indians to nonmembers of the tribe.[86] In so holding, the Court announced that tribes cannot assert an exemption from state taxation by "imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises."[87] The Court reasoned that "[i]f this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts. . . ."[88]

The Tribe asserts that the rules set forth in *Colville* are inapplicable in this case because unlike the customers who were drawn to the smokeshops to avoid state cigarette tax in *Colville,* gas purchasers are drawn to the Nation Station because of its close proximity to the casino, a tribally owned and operated endeavor. The Ninth Circuit was presented with a similar argument in *Salt River Pima-Maricopa Indian Community v. Arizona.*[89] In that case, the tribe argued that the rules set forth in *Colville* only apply in cases where a tribe attempts to create a "magnet" effect of drawing customers on to the reservation by offering a lower sales tax rate than the state. The court cast serious doubt on the tribe's attempt to read *Colville* so

[85] *Salt River Pima-Maricopa Indian Cmty. v. Arizona,* 50 F.3d 734, 737 (9th Cir.1995).

[86] 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

[87] *Id.*

[88] *Id.*

[89] 50 F.3d 734.

narrowly and held that even if *Colville* is narrowly read, the state tax will be allowed where the tribe is attempting to sell non-Indian products to non-Indians and where the state tax precludes the tribe from creating the type of tax haven the *Colville* court sought to prevent. According to the *Salt River* court, the most important factors in determining that the state tax was not preempted by federal law was that the goods and services sold were non-Indian, the legal incidence of the tax falls on non-Indians and the state provided most of the governmental services to those who bear the ultimate economic burden of the state tax.[90] Likewise, in the case before the court, the legal incidence of the tax falls on non-Indians, the Tribe is importing a non-Indian product[91] and selling the product mostly to non-Indians and those who bear the ultimate economic burden of the fuel tax, the consumers, are provided governmental services by the state.[92]

While the Tribe certainly has an interest in raising revenues, that interest is at its weakest when goods are

[90] *Id.* at 737.

[91] The court rejects the implication that fuel sold at the Nation Station is an Indian product because the Tribe operates a casino in the vicinity or that fuel is an Indian product because the Tribe financed and constructed the Nation Station to include the proper facilities for unloading, storage, and dispensing of gasoline. *See Chemehuevi Indian Tribe v. California St. Bd. of Equalization,* 800 F.2d 1446 (9th Cir.1986) (rejecting the tribe's assertion that *Colville* is inapposite where the tribe markets cigarettes as part of a legitimate business enterprise, where residents and visitors take advantage of other amenities offered by the tribe).

[92] *See Sac and Fox,* 213 F.3d at 584 (stating that the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer"). As discussed below in section D.2., the court rejects the Tribe's argument that it bears the ultimate economic burden of the fuel tax.

imported from off-reservation for sale to non-Indians.[93] The State's interest in raising revenues is strongest when, as here, non-Indians are taxed, and those taxes are used to provide the taxpayer with government services.[94] Based on the foregoing analysis, it is clear that the preemption balance unmistakably tips in favor of the State. Thus, summary judgment shall be granted as to the Tribe's claim arising under federal preemption.

2. Tribal Self-Government

The Tribe also asserts that imposition of the state fuel tax infringes on the Tribe's sovereign right to impose tribal fuel taxes, infringes upon the Tribe's sovereign right to finance and provide essential government services, infringes upon the Tribe's sovereign right to self-government and self-determination, and infringes upon the Tribe's right to conduct business and to economically develop its reservation. "The doctrine of tribal self-government, while constituting an independent barrier to the assertion of state taxing authority over activities taking place on tribal reservations, bears some resemblance to that of federal

[93] *Salt River,* 50 F.3d at 739.

[94] The Tribe has asserted that eleven percent of its fuel sales are derived from sales to reservation residents, tribal government employees and other persons who work on the reservation. The Tribe has not asserted that a majority or even a substantial portion of its fuel sales are made to reservation residents, those who primarily reap the benefits of tribal government services. It cannot be disputed that Kansas provides governmental services off the reservation to the non-Indian purchasers of fuel. In addition, the State also provides services on and near the reservation including maintenance of U.S. Highway 75, the highway that leads to the reservation. In addition to road maintenance, the State provides fire and police protection on and near the reservation.

preemption."[95] Application of this doctrine requires the Court to weigh both state and tribal interests in raising revenue to provide taxpayers with essential government services.

The Tribe's interest in raising revenues to support essential tribal services is strongest when "the revenues are derived from *value generated on the reservation* by activities involving the Tribes *and* when the *taxpayer is the recipient of tribal services.*"[96] Revenues will not be considered derived from "value generated on the reservation" if the value of the product marketed by the tribe is merely an exemption from state tax. In other words, if the tribe earns its profits simply by importing non-Indian products onto the reservation for resale to non-Indians free from state taxation, the profits are not derived from value generated on Indian lands.[97]

The Tribe asserts that the revenues derived from the fuel sold at the Nation Station are a result of value generated on Indian lands because the casino, operated in close proximity to the gas station, generates a flow of motor vehicle traffic. The Tribe contends that the gasoline market exists because of the nearby casino, not simply because patrons can purchase gas free from state motor fuel tax. Assuming the Tribe can show that they are marketing a product, the value of which is derived on reservation land, the Tribe cannot show that those who

[95] *Gila River Indian Cmty. v. Waddell,* 967 F.2d 1404, 1412 (9th Cir.1992) (citing *White Mountain Apache Tribe,* 448 U.S. at 142, 100 S.Ct. 2578).

[96] *Colville,* 447 U.S. at 156-57, 100 S.Ct. 2069 (emphasis added).

[97] *Salt River,* 50 F.3d at 738.

ultimately take on the economic burden of the tax, the consumers, are the recipients of tribal services as opposed to state services.[98]

The Tribe proposes that the ultimate economic burden of the tax does not fall on the consumers but rather it falls on the Tribe. The Tribe bases this assertion on the presumption that the tax will destroy the Nation Station's business by burdening the Nation Station with double taxation and interfering with the Tribe's right to impose tribal taxes and to finance its government. The Court cannot agree for several reasons.

First, in *Sac and Fox,* the Tenth Circuit held that even though the legal incidence of the Kansas motor fuel tax falls on the fuel distributors, the ultimate, albeit indirect, economic burden of the Kansas motor fuel tax falls on the consumer.[99] Thus, according to the Tenth Circuit, if the Tribe can show that the ultimate economic burden falls on tribal members as the consumers of the fuel, the tax improperly interferes with internal tribal affairs.[100] Such a showing would require the Tribe to produce evidence that a substantial portion of the Tribe's retail fuel sales are to tribal members. The Tribe cannot make the required

[98] *See Sac and Fox,* 213 F.3d at 584 (stating the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer").

[99] *Sac and Fox,* 213 F.3d at 584. *See also United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 607-10, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) (holding that the legal incidence of the tax does not always fall upon the entity legally liable for payment of the tax); *Chickasaw Nation v. Oklahoma Tax Comm'n,* 31 F.3d 964, 972 (10th Cir.1994) (noting that the "question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed.").

[100] *Id.*

showing as their own evidence indicates that only a small percentage of the retail fuel sales are made to tribe members. The Tribe presents evidence indicating that seventy-three percent of the fuel sold at the Nation Station is sold to casino patrons and only eleven percent of the fuel sales are made to persons who live or work on the reservation. Although the Tribe certainly provides substantial services to those persons who live and work on the reservation, that group of persons constitutes only a small portion of the consumers who purchase fuel at the Nation Station. The majority of the fuel consumers are not members of the Tribe and are thus recipients of state services.[101]

Second, the Tribe's contention that the state fuel tax and the tribe's fuel tax cannot coexist because the result will be double taxation and an increase in the product's cost must also be rejected. There is no question that the Tribe's power to tax transactions occurring on trust lands "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law. . . ."[102] But, a tribe cannot oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business.[103]

[101] The Court recognizes that the Tribe provides some governmental services to non-Indian purchasers by constructing and maintaining reservation roads and providing police protection. But, it cannot be disputed that the vast majority of governmental services used by the non-Indian purchasers are provided by the State, off the reservation.

[102] *Colville,* 447 U.S. at 152, 100 S.Ct. 2069.

[103] *Id.* at 154-158, 100 S.Ct. 2069. *See also Gila River Indian Cmty.,* 91 F.3d 1232, 1239 (9th Cir.1996) ("The State and Tribe have concurrent taxing jurisdiction . . . [a]ccordingly, the Tribe's tax program is not undermined by the state tax.").

Further, any negative economic impact on the Tribe by the imposition of the state fuel tax is not necessarily sufficient to invalidate the tax.[104] Indeed, the state may sometimes impose a "non-discriminatory tax on non-Indian consumers of Indian retailers doing business on the reservation . . . even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[105]

Finally, the Tribe has failed to show that the state motor fuel tax substantially affects its ability to offer governmental services or in any way affects the Tribe's right to self-government. The Supreme Court has held that merely because the result of imposing the fuel tax will deprive the Tribes of the revenues which they are currently receiving, does not infringe on the right of reservation Indians to "make their own law and be ruled by them."

The Tribe's interests in raising revenues simply cannot outweigh the State's legitimate interest in raising revenues through its system of taxation.[106] The State's interest in imposing such a tax is greatest when the "tax is directed at off-reservation value and when the taxpayer is the recipient of state services".[107] In this case, it is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors.[108] Further, it is also

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[104] *Colville,* 447 U.S. at 152, 100 S.Ct. 2069; *Sac and Fox,* 213 F.3d at 583.

[105] *Colville,* 447 U.S. at 151, 100 S.Ct. 2069.

[106] *Id.* at 157, 100 S.Ct. 2069. *See also ANR Pipeline,* 150 F.3d at 1193 ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.").

[107] *Colville,* 447 U.S. at 157, 100 S.Ct. 2069.

[108] *Sac and Fox,* 213 F.3d at 580.

undisputed that only a small part of the fuel sales are made to persons who either live or work on the reservation who are the recipient of tribal services. The majority of the fuel consumers are recipients of state services. Even if the Court accepts the Tribe's proposition that the fuel sales are a result of value generated on reservation land, the Tribe cannot show that a substantial portion of the taxpayers are recipients of tribal services as opposed to state services. For the above reasons, defendant's motion for summary judgment shall be granted on the Tribe's claim regarding tribal rights to self-government.

E. Kansas Act for Admission

In addition to claims based on preemption and tribal rights to self-government, the Tribe also asserts a claim under the Kansas Act for Admission § 1. The Kansas Act for Admission states that:

> [n]othing contained in said [Kansas] constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory. . . .

Based on this language, the Tribe argues that the state is prohibited from taking action that impairs the Tribe's right to impose and collect its own tribal taxes, impairs the Tribes right to finance its government through tribal taxation and imposes on the Tribe's right to engage

in sovereign functions of self-government. The Tribe asserts that unlike causes of action based on federal preemption, there is no need to balance the state, federal and tribal interests for claims arising from the Kansas Act for Admission.

The Court finds that even if the Kansas Act for Admission can be read to preserve the Tribe's sovereign right to impose tribal taxes on reservation and to engage in commercial business on its reservation as proposed by the Tribe, the Court's foregoing analysis regarding tribal rights to self-government is still applicable. As mentioned above, while the Tribe has every right to impose tribal fuel taxes, by doing so it does not oust the State from imposing state tax on sales made to non-Indians. Further, even if the state tax imposes on the Tribe's ability to carry-on a commercial business by increasing the cost of the product, a state tax on non-Indians "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[109] "[T]he tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all."[110] For these reasons defendant is entitled to judgment as a matter of law and summary judgment is granted on the Tribe's claim asserted under the Kansas Act for Admission.

IV. CONCLUSION

In finding that the Court has jurisdiction over this matter, the Court rejects defendant's claim to immunity based on the Eleventh Amendment and rejects defendant's

[109] *Colville*, 447 U.S. at 151, 100 S.Ct. 2069.

[110] *Id.*

claim that the Tribe lacks standing to bring this suit. Additionally, the Court finds, contrary to defendant's arguments, that the Hayden-Cartwright Act does not provide for an explicit grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations. Finally, because no material issue of fact remains regarding the Tribe's claims arising under federal preemption, tribal right to self-government or Kansas Act for Admission and because defendant is entitled to judgment as a matter of law, defendant's motion for summary judgment is granted.

IT IS THEREFORE BY THE COURT ORDERED that State's Motion for Summary Judgment (Doc. 59) is GRANTED.

IT IS SO ORDERED.